MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gregory Bergman,
Appellant-Respondent,

v.

Susan Markley,
Appellee-Petitioner.

April 23, 2021

Court of Appeals Case No. 20A-DR-2015

Appeal from the Howard Superior Court

The Honorable Brant J. Parry, Judge

Trial Court Cause No. 34D02-0506-DR-616

Bradford, Chief Judge.

Case Summary

[1] Gregory Bergman ("Husband") and Susan Markley ("Wife") were married on June 7, 1980. They separated on June 29, 2005, the same day that Wife filed a petition to dissolve the parties' marriage. During the course of the parties' marriage, Husband served in the United States Air Force and in the Indiana National Guard before receiving a medical discharge. Following his service in the military, Husband worked in a civilian role for the Department of Defense ("DOD") as an air traffic controller. During his employment with the DOD, Husband earned retirement benefits under the Federal Employees Retirement System ("FERS"). Husband did not receive a military pension due to accepting a settlement from the National Guard at the time of his medical discharge, but was able to purchase credit for his years of military service to be reflected as years of federal employment in the calculation of his FERS civilian pension. The parties' divorce was finalized on August 31, 2005. The parties' agreed division of the marital estate provided that Wife would receive one-half of Husband's military pension and one-half of his vested FERS civilian pension.

[2] Husband retired from the DOD in August of 2018, after which Wife requested a hearing regarding the amount of Husband's retirement benefits to which she was entitled. On August 13, 2020, the trial court issued an order in which it determined that Wife was not entitled to receive any of Husband's FERS civilian pension because the pension was not vested at the time Wife filed for divorce. The trial court further determined that although Husband did not receive a military pension, Wife was entitled to receive twenty-two percent of

Husband's pension benefits because that portion reflects one-half of the benefits that stem from Husband's military service.

[3] On appeal, Husband contends that the trial court erred in finding that Wife was entitled to twenty-two percent of his pension benefits. Wife argues on cross-appeal that the trial court erred in finding that Husband's FERS civilian pension was not vested as of the date that she filed for divorce. Upon review, we conclude that the trial court erred in finding that Wife was entitled to twenty-two percent of Husband's pension benefits. We also conclude that the trial court did not err in finding that Husband's FERS civilian pension was not vested as of the date of Wife filed for divorce. We therefore affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[4] Husband began serving in the Air Force on September 25, 1979. He and Wife married on June 7, 1980. Husband retired from the Air Force on May 8, 1991. He subsequently served in the National Guard. He ultimately received a medical discharge from the National Guard on August 26, 2001. Following his medical discharge, Husband accepted an approximately $35,000.00 settlement from the National Guard. By accepting this settlement, Husband forfeited his right to a military pension. In a letter dated December 29, 2016, a representative of the United States Defense Finance and Accounting Service verified that "there is no retired military pay due" to Husband. Ex. Vol. p. 40.

[5] After being discharged from the National Guard, Husband worked in a civilian role for the DOD as an air traffic controller. During his DOD employment, Husband earned retirement benefits, including a pension, under the FERS. An overview of the benefits provided under the FERS states that to be vested for purposes of receiving a pension, an employee "*must* have at least 5 years of creditable civilian service." Ex. Vol. p. 91 (emphasis added). Also during his civilian employment, Husband was given the opportunity to purchase credit for his years of military service in connection to his FERS civilian pension.

[6] A civilian federal employee "shall be allowed credit for … each period of military service performed after December 31, 1956, and before the separation on which title to annuity is based, if a deposit (including interest, if any) is made with respect to such period in accordance with section 8422(e)[1]." 5 U.S.C. § 8411(c). Further, under the FERS rules and regulations, "active duty military service from which you have been honorably discharged is creditable for retirement purposes if you are not receiving retired military pay for that service – ***and if a deposit to the appropriate civilian retirement system has been completed***." Ex. Vol. p. 30 (emphasis in original). However, "military service is generally

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[1] [E]ach employee or Member who has performed military service before the date of the separation on which the entitlement to any annuity … may pay … to the agency by which the employee is employed … an amount equal to 3 percent of the amount of the basic pay paid … to the employee or Member for each period of military service after December 1956. The amount of such payments shall be based on such evidence of basic pay for military service as the employee or Member may provide, or if … sufficient evidence has not been so provided to adequately determine basic pay for military service, such payment shall be based on estimates of such basic pay[.]

5 U.S.C. § 8422(e)(1)(A).

not creditable if you are receiving retirement pay for that service." Ex. Vol. p. 30. Thus, an individual may only receive credit for their military service if they "make the necessary deposits for that service, then waive" or forfeit their military retired pay at or before their civilian retirement. Ex. Vol. p. 30. Husband began making the necessary deposits to purchase credit for his years of military service during the parties' marriage but did not complete the process until 2018.

[7] On June 29, 2005, the parties separated, and Wife filed a petition to dissolve the parties' marriage ("the dissolution petition"). The parties entered into an agreed division of the marital estate ("the dissolution agreement") on August 30, 2005. According to the terms of the dissolution agreement, which was drafted by Wife's counsel, Wife was to receive, *inter alia*, any pension in her name, one-half of Husband's military pension, and one-half of Husband's "vested Department of Defense (DOD) pension." Appellant's App. Vol. II p. 14. On August 31, 2005, the trial court accepted the dissolution agreement and entered an order dissolving the parties' marriage.

[8] Husband retired from his civilian DOD employment on August 1, 2018. Shortly thereafter, Wife requested a hearing regarding the amount of Husband's retirement benefits to which she was entitled. On August 13, 2020, the trial court issued an order in which it found, in relevant part, as follows:

> 4. [Husband] was employed in the military for 152 months during the marriage.
> 5. [Husband] was employed in a civilian capacity for 34

months during the marriage.

6. In his career, [Husband] was employed by the military or in a civilian capacity for a total of 342 months.

7. The Court finds that a person do[e]s not vest in FERS until they have "at least 5 years of creditable civilian service. In this case, [Husband] did not have 5 years of civilian service as of the date of filing. Therefore, his DOD pension had not vested as of the date of filing.

8. The court finds that [Husband] began to "buy into" the FERS program during the marriage. Once he began to do that, his military pension was combined into his DOD pension.

9. As a result, [Husband] does not receive a military pension. He receives one pension from the DOD.

10. Pursuant to the Agreement of the parties and the Decree, [Wife] shall receive 50% of [Husband's] military pension. [Husband's] current pension benefit is made of his military years and his civilian years. The total months of service is 342 months. The total months served in the military is 152 months. Therefore, 44% of the pension was earned during his time in the military. [Wife] shall receive one-half of that amount, or 22%.

11. [Husband] began receiving his pension benefit on August 1, 2018. [Wife] should have begun receiving her potion on that date. [Husband] receives $2,765.00 per month in his gross monthly annuity. 22% of that amount is $608.03. 24 months have passed since the disbursements began. Therefore, [Wife] is owed $14,599.20 as a result of the retroactivity of this Order.

12. [Husband] began making payments to "buy into" the FERS system during the marriage. He finished making those payments after the dissolution was filed. [Husband] paid $4,929.94 after the dissolution was filed. [Husband] shall receive a credit for one-half of that amount ($2,464.97) against the amount owed retroactively.

13. Therefore, due to retroactivity of this Order, [Husband] is ordered to pay [Wife] $12,134.23. Said amount is reduced to judgment with interest accruing at 8% per annum.

Appellant's App. Vol. II pp. 10–11. Husband subsequently filed a motion to correct error, which was denied by the trial court.

Discussion and Decision

[9] "Generally, the marital pot closes on the day the petition for dissolution is filed." *Granzow v. Granzow*, 855 N.E.2d 680, 683 (Ind. Ct. App. 2006) (citing *Sanjari v. Sanjari*, 755 N.E.2d 1186, 1192 (Ind. Ct. App. 2001)). "The date of filing is defined by statute as the date of 'final separation.'" *Id.* (citing Ind. Code § 31-9-2-46). "Indiana Code Section 31-15-7-4(a)(2)(B) provides that only property acquired by either or both parties before the date of final separation is marital property subject to division in dissolution proceedings." *Id.* at 684. "Thus, the determinative date when identifying marital property subject to division is the date of final separation, in other words, the date the petition for dissolution was filed." *Id.* "To be included as marital property subject to division in dissolution proceedings, pension benefits must, on the date of final separation, not be forfeitable upon the termination of employment *or they must be vested*, whether payable before or after the dissolution." *Id.* (emphasis added). Stated differently, "[u]nvested pension benefits cannot be included in the marital pot for division." *Hodowal v. Hodowal*, 627 N.E.2d 869, 873 (Ind. Ct. App. 1994).

I. Standard of Review

[10] The trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A).[2] Our standard of review is well-settled:

> We must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Balicki v. Balicki*, 837 N.E.2d 532, 535 (Ind. Ct. App. 2005), *trans. denied*. We will disturb the judgment only where there is no evidence supporting the findings or the findings do not support the judgment. *Id.* We do not reweigh the evidence and consider only the evidence favorable to the trial court's judgment. *Id.* Appellants must establish that the trial court's findings are clearly erroneous, which occurs only when a review of the record leaves us firmly convinced a mistake has been made. *Id.* at 535–36. However, although we defer substantially to findings of fact, we do not defer to conclusions of law. *Id.* at 536. Additionally, a judgment is clearly erroneous if it relies on an incorrect legal standard. *Id.*

Maxwell v. Maxwell, 850 N.E.2d 969, 972 (Ind. Ct. App. 2006), *trans. denied*.

[11] Furthermore, when reviewing contracts and agreements entered into by the parties, "[c]ourts are required to give effect to parties' contracts and to do so, courts look to the words of a contract." *MPACT Const. Grp., LLC v. Superior Concrete Constructors*, *Inc.*, 802 N.E.2d 901, 910 (Ind. 2004). "In contracting,

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[2] Trial Rule 52(A) provides that "[i]n the case of issues tried upon the facts without a jury …, the court shall determine the facts and judgment shall be entered thereon[.]" "Upon its own motion, or the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury … shall find the facts specially and state its conclusions thereon." Ind. R. Trial P. 52(A).

clarity of language is key." *Id.* "When there is ambiguity in a contract, it is construed against its drafter." *Id.* (citing *Philco Corp. v. Automatic Sprinkler Corp. of Am.*, 337 F.2d 405, 408 (7th Cir. 1964); *Smith v. Sparks Milling Co.*, 219 Ind. 576, 603, 39 N.E.2d 125, 135 (1942); *Bicknell Minerals, Inc. v. Tilly*, 570 N.E.2d 1307, 1313 (Ind. Ct. App. 1991), *trans. denied*). The parties' settlement agreement was drafted by Wife's counsel. Thus, any ambiguity in the agreement will be construed against Wife.

II. Direct-Appeal Issue

[12] Husband contends on appeal that the trial court erred in determining that Wife was entitled to twenty-two percent of his FERS civilian pension. In support, Husband asserts that he does not receive a military pension and the funds relating to his military service were nothing more than an enhancement to his FERS civilian pension, which he received after purchasing credit for his years in the military.

[13] With respect to the entitlement to receive a pension following receipt of a disability severance pay, federal law provides as follows:

> Unless a person who has received disability severance pay again becomes a member of an armed force, the National Oceanic and Atmospheric Administration, or the Public Health Service, *he is not entitled to any payment* from the armed force from which he was separated for, or arising out of, his service before separation, under any law administered by one of those services or for it by another of those services.

10 U.S.C. § 1213 (emphasis added). It is undisputed that Husband did not rejoin the military or join either the National Oceanic and Atmospheric Administration or the Public Health Service after receiving a disability severance pay from the military. As such, we agree that Husband forfeited his right to collect a military pension by accepting the approximately $35,000.00 settlement following his medical discharge. This fact was subsequently verified in a letter dated December 29, 2016, in which a representative of the United States Defense Finance and Accounting Service verified that "there is no retired military pay due" to Husband. Ex. Vol. p. 40. The trial court correctly found that Husband does not receive a military pension.[3]

[14] The next question we must address is whether the trial court erred by granting Wife one-half of the amount of Husband's FERS civilian pension enhancement that it determined was attributable to Husband's military service. In *Granzow*, wife sought to have a pension enhancement that vested for husband after the date the parties filed for divorce included in the marital estate. 855 N.E.2d at

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[3] To the extent that Wife asserts that inclusion of the terms "military pension" was the result of allegedly dishonest behavior by Husband, we are unpersuaded. While the parties' dissolution agreement stated that Wife would receive one-half of Husband's military pension, Wife admitted that Husband never indicated prior to signing the dissolution agreement that he would have a military pension, stating that "[n]o, it was just an assumption." Tr. Vol. II p. 41. Further, the parties' agreement also indicated that Wife was entitled to receive her entire pension, despite the fact that Wife knew she did not have a pension in her name when she filed for divorce. It is unclear why Wife's counsel, *i.e.*, the drafter of the dissolution agreement, would include a pension that his client knew did not exist as part of the marital assets. Its inclusion, however, suggests that the inclusion of the also non-existent military pension was not the result of any bad acts or dishonest behavior by Husband, but rather was based upon the unverified assumptions of the agreement's drafter. The fact that Wife assumed but apparently did not verify whether Husband would receive a military pension at the time that her counsel was drafting the dissolution agreement cannot now be circumvented by a claim that the language used in the agreement was ambiguous. *See MPACT*, 802 N.E.2d at 910 ("When there is ambiguity in a contract, it is construed against its drafter.").

684. Wife did not dispute that husband completed the triggering event, *i.e.*, thirty years of service with his employer, after the final separation date. *Id.* Rather, wife claimed that the portion of husband's pension attributable to his thirty-year anniversary with his employer was marital property "because the majority of the [thirty-year] service requirement was earned during the marriage." *Id.* (internal quotation marks omitted, brackets in original). Wife cited "to no Indiana cases holding that a pension enhancement or other asset that accrues or vests after the date of filing should be included in the marital estate subject to division in dissolution proceedings." *Id.* We concluded that in claiming the pension enhancement should be included in the marital estate, wife "essentially asks us to ignore Indiana Code Sections 31-9-2-98(b) and 31-15-7-4(b), which together provide that the dissolution court shall only divide property owned as of the date the petition is filed." *Id.* Because husband's entitlement to the enhanced pension did not accrue incrementally but vested in its entirety after the final separation date, we concluded that the "enhanced pension, namely, the additional amount that vested when husband reached thirty years of continuous employment with [employer]," was not marital property as defined under Indiana Code Section 31-9-2-98(b). *Id.*

[15] We reached a similar conclusion in *Hodowal*. 627 N.E.2d at 873. In that case, wife sought to have husband's early retirement subsidy, which was not vested at the time the parties filed for divorce, included as a marital asset. We concluded that it was error for the trial court to count the early retirement subsidy as a marital asset because husband's "contractual right to an early retirement

subsidy has not accrued incrementally but will vest in its entirety, if ever, at one point in time some 9 years after the date of separation … on the date of separation, no right to the subsidy had been earned or accrued, and there was no vested or non-forfeitable property interest in the subsidy to divide." *Id.*

[16] In this case, Husband began making the necessary deposits to purchase credit for his years of military service during the parties' marriage but did not complete the process until 2017 for his service in the National Guard and 2018 for his service in the Air Force. As such, his right to receive the pension enhancement did not vest until the process was completed in 2017 and 2018, respectively, approximately twelve to thirteen years after the parties' divorce was finalized. Applying our prior conclusions in *Granzow* and *Hodowal* to the facts of this case, we conclude that the trial court erred by granting Wife one-half of the enhanced pension benefits earned by Husband as a result of the credit attributed to his military service because the enhanced pension benefits did not vest until approximately thirteen years after Wife filed for divorce.

[17] For the above-stated reasons, we conclude that the trial court erred by awarding Wife twenty-two percent of Husband's FERS civilian pension. On remand, we instruct the trial court to award the entire FERS civilian pension to Husband and to rescind the portion of its order where it found that Husband owed Wife $12,134.23 in retroactive payments.

III. Cross-Appeal Issue

[18] Wife contends on cross-appeal that the trial court erred in finding that Husband's FERS civilian pension was not vested at the time she filed the dissolution petition. The trial court, after considering the evidence presented by the parties, found "that a person do[e]s not vest in FERS until they have at least 5 years of creditable civilian service. In this case, [Husband] did not have 5 years of civilian service as of the date of filing. Therefore, his [FERS civilian] pension had not vested as of the date of filing." Appellant's App. Vol. II p. 10.

[19] Again, the FERS Overview provides that to be vested for purposes of receiving a pension, an employee "*must* have at least 5 years of creditable civilian service." Ex. Vol. p. 91 (emphasis added). Husband asserted in response to interrogatories provided to him by Wife that his FERS civilian pension was not vested as of the date Wife filed the dissolution petition and Husband's civilian federal employment records, which were included in the record before the trial court, support this assertion. Given this evidence, we conclude that the trial court did not err in determining that Husband's FERS civilian pension was not vested at the time Wife filed the dissolution petition.

[20] Wife points to conflicting evidence in support of her claim that the trial court erred in finding that Husband's FERS civilian pension was not vested at the time the dissolution petition was filed. However, the trial court, acting as the fact-finder, was under no obligation to give the same amount of credit to the conflicting evidence as Wife does. *See Riviera Plaza Invs., LLC v. Wells Fargo*

Bank, N.A., 10 N.E.3d 541, 549 (Ind. Ct. App. 2014) (providing that the trial court, acting as the trier-of-fact, was free to believe or disbelieve a witness's testimony and to weigh said testimony accordingly). Wife's contention regarding Husband's FERS civilian pension effectively amounts to a request to reweigh the evidence, which we will not do. *See Maxwell*, 850 N.E.2d at 972.

[21] Wife further asserts that the reference to the "vested" portion of Husband's FERS civilian pension is ambiguous because Husband's knowledge that he had no vested FERS civilian pension "makes it clear that" when negotiating the dissolution agreement, the parties "were contemplating his future contributions and benefits to his [FERS civilian] pension and not just the marital portion thereof." Appellee's Br. p. 10. Wife's assertion, however, is a purely self-serving, speculative leap that is not supported by the record.

[22] The dissolution agreement clearly states that Wife was entitled to receive fifty percent of Husband's *vested* pension. There is no ambiguity. The dissolution agreement mentions only Husband's vested pension and makes no mention of or reference to any pension benefit that might vest in the future. Furthermore, even if the provision was ambiguous, any ambiguity would be construed against Wife as the drafter of the document. *MPACT*, 802 N.E.2d at 910. The fact that Wife apparently did not verify whether Husband had a vested interest in his FERS civilian pension at the time that her counsel was drafting the dissolution agreement cannot now be circumvented by a claim that the language used in the agreement was ambiguous.

[23] Again, "[u]nvested pension benefits cannot be included in the marital pot for division." *Hodowal*, 627 N.E.2d at 873. Thus, for the foregoing reasons, we conclude that the trial court did not err in determining that Wife was not entitled to receive any portion of Husband's FERS civilian pension as the pension was not vested on the date that Wife filed for divorce.

Conclusion

[24] In sum, we conclude that the trial court erred by awarding Wife twenty-two percent of Husband's FERS civilian pension. We also conclude that the trial court did not err in determining that Wife was not entitled to receive any portion of Husband's FERS civilian pension as the pension was not vested at the time of the divorce filing. On remand, we instruct the trial court to revise its August 13, 2020 order to reflect our conclusions stated herein.

[25] The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions.

Vaidik, J., and Brown, J., concur.